

On December 4, 1994 appellant, then a 44-year-old city carrier, filed a claim alleging that she sustained an emotional condition as a result of her federal employment. The Office accepted

her claim for a temporary aggravation of depression and paid compensation for temporary total disability.<sup>1</sup>

On July 13, 1998 the employer offered appellant a modified carrier position at the Terminal Annex in downtown Denver. On July 20, 1998 the Office found this position suitable and gave her 30 days to accept or explain her reasons for refusing.

Appellant's clinical psychologist wanted a job analysis so she could address the suitability of the offer. She stated she would not approve the job without an interview for appellant. On July 20, 1998 appellant attended an interview with her new manager. However, it did not take place at the Terminal Annex location, but in Commerce City, where the employer was now offering her the position of purchasing clerk. An Office rehabilitation counselor prepared a job analysis of the purchasing clerk position for appellant's clinical psychologist, who disapproved because of the length of the commute to Commerce City. When the Office asked the employer to clarify the commuting issue, the employer explained that it was approximately one hour's drive from appellant's home to the Terminal Annex in downtown Denver.

The Office found that appellant's reason for not accepting the offered position was unjustified and gave her 15 days to accept. On October 30, 1998 it terminated her compensation under 5 U.S.C. § 8106(c)(2) for refusing a suitable job offer as a modified letter carrier. On November 16, 1998 appellant's clinical psychologist found that she was permanently psychologically disabled and would not be able to function in any capacity within the U.S. Postal Service.

The Board set aside the Office's termination of compensation and returned the case record to the Office for reconstruction and a *de novo* decision to protect appellant's appeal rights.<sup>2</sup> The Office issued a *de novo* decision on March 16, 2001, again terminating her compensation for refusing a suitable job as a modified letter carrier.

On July 13, 2001 an Office hearing representative set aside the termination of compensation and remanded the case for further development of the medical evidence. A conflict in medical opinion then arose when an Office second-opinion psychiatrist reported that appellant was capable of returning to work in July 1998.<sup>3</sup>

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<sup>1</sup> OWCP File No. xxxxxx875. In a previous claim, OWCP File No. xxxxxx732, the Office accepted reactive depressive disorder with associated anxiety.

<sup>2</sup> Docket No. 99-1053 (issued July 24, 2000).

<sup>3</sup> The Office supplied the psychiatrist with a statement of accepted facts finding that the job location at the Terminal Annex in downtown Denver was within appellant's commuting ability.

On March 1, 2002 an impartial medical specialist reviewed the job description for modified letter carrier. He found that appellant was capable of returning to work under the circumstances present for the job that the employer offered her in July 1998. The medical specialist based his opinion, in part, on the work environment described in the job analysis for the position of purchasing clerk in Commerce City. The physician stated:

“The environment of the 1998 offered workplace was described as being ‘exceptional’ because of the supervisor’s and coworkers’ ability to empathize with and adapt to restrictions required by other employees. The job was described as ‘low pressure ... all duties would be tailored to [appellant’s] physical restrictions.’ It was also noted that the supervisor himself had been disabled and that the work environment was ‘warm and accepting.’”

On April 3, 2002 the Office terminated appellant’s compensation on the grounds that she was capable of performing the offered job of modified letter carrier and failed to take the job without justification. In decisions dated May 28, 2003 and September 12, 2007, it reviewed the merits of her case and denied modification of its prior decision.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of the Federal Employees’ Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation.<sup>4</sup> The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee’s ability to work, and has the burden of establishing that a position has been offered within the employee’s work restrictions, setting forth the specific job requirements of the position.<sup>5</sup> In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.<sup>6</sup> As a penalty provision, section 8106(c)(2) must be narrowly construed.<sup>7</sup>

### **ANALYSIS**

The Office terminated appellant’s compensation for wage loss on the grounds that she refused the employer’s July 13, 1998 offer to return to work as a modified letter carrier at the Terminal Annex in downtown Denver. However, after the July 13, 1998 offer was made, the employer introduced a second position. Just as the Office made its finding that the position of

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<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

<sup>6</sup> *Glen L. Sinclair*, 36 ECAB 664 (1985).

<sup>7</sup> *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

modified letter carrier was suitable, the employer interviewed her for a purchasing clerk position in Commerce City. While it attempted to follow its suitable work procedures with respect to the original position in downtown Denver, the employer, the Office rehabilitation counselor, appellant and her clinical psychologist focused on returning appellant to a purchasing clerk position in Commerce City. The employer interviewed appellant for that position, the Office rehabilitation counselor prepared a job analysis for that position, her clinical psychologist reviewed it and did not approve. The impartial medical specialist found the environment in Commerce City supportive and the personnel empathetic. However, this was not the position the Office reviewed when it made its July 20, 1998 finding of suitability and this was not the position on which the Office based its termination of compensation.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation. The employer prepared no written job offer for the Commerce City position. The Office made no finding that the Commerce City position was suitable. It took appellant's reasons for not accepting the Commerce City position and found they did not justify her refusal of the modified carrier position in downtown Denver. In the end, the Office invoked 5 U.S.C. § 8106(c)(2), a penalty provision, based on appellant's refusal to accept a position that the employer was no longer offering. The Board finds that the employer effectively withdrew its July 13, 1998 offer for the modified letter carrier position at the Terminal Annex in downtown Denver when it interviewed appellant for the purchasing clerk position in Commerce City.

For these reasons, the Board finds that the Office has not met its burden to justify the termination of appellant's compensation under 5 U.S.C. § 8106(c)(2). The Board will reverse the Office's September 12, 2007 decision denying modification of its prior decision.

### **CONCLUSION**

The Board finds that the Office improperly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 12, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 24, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board